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IN THE

Supreme Court of the United States

No. 873

ADELBERT W. LEE

Petitioner

vs.

THE AETNA CASUALTY AND SURETY CO.,
a body corporate, and
THE AUTOMOBILE INSURANCE CO.,
a body corporate, and
WOODROW W. MILLER

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

I. The petitioner, Adelbert W. Lee, appellee below, prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the District of Columbia in their case No. 12451, decided January 19, 1956; opinion reported in 229 F. 2d. 787, —— U.S. App. D.C. ——; appended hereto.

II. Jurisdiction of this Court is believed to be found in 28 U.S.C.A. 1254.

III.

QUESTIONS PRESENTED FOR REVIEW:

1. Was there sufficient evidentiary basis for the jury's verdict, and did reversal constitute a deprivation of petitioner's rights to jury trial?

2. Where agent asserts that insurance company breached its contract with him by wrongful interference with and solicitation of agent's customers, and asserts conspiracy between said insurance company and agent's former employee, was proof that said company made available to such former employee the agent's expiration records essential to recovery against such company?

IV.

STATEMENT OF THE FACTS:

Petitioner, Lee, was awarded damages in the amount of $12,000 by a jury in the United States District Court for the District of Columbia, which Court denied motions for judgment notwithstanding the verdict and new trial, and entered judgment upon the jury's verdict.

The Court of Appeals reversed, ordering judgment for defendants, holding there was no substantial evidence of the conspiracy theory and no other bases of liability.

Lee has an established real estate and insurance business, having represented, among others, the Aetna Group (respondents) for a number of years. Respondent Miller was employed by Lee to handle the insurance branch of his business. After some years, Miller became dissatisfied and quit, and immediately thereafter on, to-wit: March 21, 1951, (J. A. 464)* was made an "office agent" of

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* References are to Joint Appendix.

Aetna. Then ensued a transfer of Lee's customers over to Miller, commencing on March 22, 1951 (J. A. 461) and continuing for about one year, during which time about 60 customers changed hands. Respondents produced at trial, letters from each of the policyholders. Most of these letters were typewritten, on plain white paper, in almost identical wording, and respondent Miller admitted that he had typed, or had them typed, for the signature of the policyholders. As to those written by the policyholder, Miller admitted that he told the policyholder what to put in the letter (J. A. 198-203).

V.

REASONS FOR GRANTING THE WRIT:

1. The decision of the Court below conflicts with decisions of this Court that the choice of conflicting versions of the evidence and inferences to be drawn from the evidence, are always questions for the jury.

This Court has held that once there is found a reasonable basis in the record to support the jury's verdict, even though this be wholly circumstantial, then it is an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury. *Lavender* v. *Kurn*, 66 S. Ct. 740; 744; 327 U.S. 645. *Ellis* v. *Union Pac. R. Co.*, 67 S. Ct. 598, 600; 329 U.S. 649. See also:

Tennant v. *Peoria & P. U. Ry. Co.*, 64 S. Ct. 409, 410; 321 U.S. 29.

There, in an action by the widow, under Federal Employers Liability Act, for wrongful death of her husband, the United States Circuit Court of Appeals, 7th Circuit, reversed a District Court judgment entered upon a jury's verdict, holding there was no substantial proof that negli-

gence was the proximate cause of the death. This Court had granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation. Said this Court:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence." . . .
>
> • • • •
>
> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case." . . .

Our Court of Appeals, in its opinion, recites certain evidence which it states tends to negate the theory that Aetna and Miller were engaged in a conspiracy to deprive Lee of business. We respectfully show that as to each piece of evidence so recited, there was actually conflicting evidence in the record:

1. The Court states that Miller and officials of Aetna testified that Aetna officials had tried to dissuade Miller from leaving Lee. We readily concede they did so testify. But, Lee testified that he called Rhine, Aetna's Superintendent of Agents, a few days after Miller had left, asking if Miller was going with Aetna and Rhine said he wasn't sure; that a day or two later, he went in to see Mann, Aetna's General Manager, who said there had been some discussion, but that as far as he knew, Miller was not going with Aetna (J.A. 34-5). Yet, it was admitted at trial that Aetna had agreed to appoint Miller as an agent the very next day after he left Lee (J.A. 227-8; 464).

Thus, it was for the jury to determine whether the Aetna officials had been trying to dissuade Miller from leaving Lee, or whether they had appointed Miller immediately and then attempted to conceal that fact from Lee.

Furthermore, Lee testified that Miller had been going down to Aetna's office in the mornings for several weeks just before leaving Lee, and this was contrary to the usual procedure in Lee's office (J.A. 33).

2. The Court states that Aetna officials testified that they gave Lee considerable assistance in developing new accounts after Miller left and that the record includes letters from Lee to Aetna in which Lee thanked Aetna for such assistance. Here, again, we readily concede this evidence. But, in direct conflict therewith is the following evidence, likewise in the record:

Lee testified that Aetna officials gave him very little assistance after Miller left and that he had on several occasions complained to such officials about this (J.A. 45, 46).

Stan Betts, Aetna's agent who would be giving this assistance, produced his "projected schedule" for several months after Miller left. This schedule revealed that upon one occasion he had cancelled a proposed schedule for assistance to Lee's office, and changed the appointment to assist Miller (J.A. 300).

3. The Court states: "But every insured who appeared as a witness testified that Miller did not solicit the transfer of business; and it was stipulated that all the other insureds would so testify". And further. "Contrary to the allegation of conspiracy was the unanimous testimony of the numerous insureds that Miller did not solicit the transfers of business."

Actually, there was a stipulation in the case that certain policyholders, 32 in number, would, if called to the

stand, testify similarly to nine policyholders who had testified (J.A. 376). Among those nine policyholders, we find the following testimony:

Hummer testified that defendant Miller had him write his letter transferring his business from Lee to Miller, "when he (Miller) changed his connections from Mr. Lee". (J.A. 237).

Bodmer testified that his letter transferring his business from Lee to Miller was prepared "because Woodie (Miller) told me that he was getting this agency and he wanted verification of customers" (J.A. 351).

True, these witnesses had earlier testified that Miller did not solicit their business. But, the choice as to which part of their testimony was to be believed was clearly for the jury, whose determination should not have been disturbed on appeal.

Furthermore, policyholder Bonbrest, was another who testified that defendant Miller did not solicit his business; but on cross-examination, this witness admitted that in a letter he wrote to Lee on April 21, 1951, he stated that he was awaiting recommendation as to whether he needed additional insurance coverage and that, *in the interim*, his insurance with Lee would remain intact (J.A. 381). When questioned as to who was supposed to give him these recommendations that he was awaiting, he hesitantly said it must have been Lee (J.A. 381). Obviously, it was not Lee, for the letter was addressed to Lee. Furthermore, just four days later, this witness wrote a letter to Aetna transferring his business from Lee to Miller (J.A. 476). He admitted that Miller dictated the statement for that letter (J.A. 382). Clearly, the jury had a right to find that Miller was the person making a study of Bonbrest's insurance in order to give him recommendations and that after he completed his study and gave Bonbrest the recommendations, he then

told Bonbrest how to write the letter to Aetna, transferring his entire business over to him. Indeed, making a study of a man's insurance problems and making recommendations to him as to his coverage requirements is an insurance man's strongest form of solicitation.

Thus, we maintain, there was ample evidence to support a jury finding of solicitation. But, said our Court of Appeals, "solicitation alone would not give rise to liability, there being no agreement that Miller would not solicit or compete."

True, there was no agreement between Miller and Lee that Miller would not solicit or compete. But, the question in this case was not what Miller alone could do, but what Aetna could or could not do. There was an agency contract between Lee and Aetna, under which Aetna could not solicit nor compete. Here we come to our second reason for granting the writ in this cause.

2. The decision of the Court below is in direct conflict with the decision of:

> *Phillips & Co. et al* v. *Penna. Threshermen & Farmers Mut. Cas. Ins. Co.*, CCA 4, 199 F. 2d 244, 248, Cert. den. 345 U.S. 906, 735 Ct. 645, reh. den. 345 U.S. 931, 735 Ct. 779

Phillips operated an insurance business, having agency contracts with various companies. The contract with defendant gave Phillips control of the expirations upon termination (as did Lee's contract with Aetna in our case). After termination of the contract defendant appointed about 90 of Phillips' former employees. Plaintiff sued defendant for wrongfully interfering with, and depriving plaintiff of, Plaintiff's expirations. On motion for summary judgment District Court dismissed, except for certain commissions on business written before termination of the contract. Appellate Court reversed.

In our case, the Court below held that proof that Aetna made available to Miller the renewal, or expiration *records*, was essential to recovery. The Court stated that the *Phillips* case (supra) "involved solicitation of plaintiff's customers and specifically conditioned its result on unauthorized use of plaintiff's expiration *records*".

We do not so read the Phillips opinion. See page 248 of 199 F.2d.:

> "The provision of the Contract that the 'Agent's record, use and control of the expirations shall be deemed the property of the Agent and left in his undisputed possession' *meant more than he should have possession of the records* of policies that had been written. *Its purpose was to vest in him the good will of the business* which he was about to build up and to undertake that the Company would not interfere with this business by soliciting renewals thereof in the event of the termination of the agency without his fault. It has been held a violation of the provision for the company to solicit renewals of policies which had been written through the agent. *Kerr & Elliott* v. *Green Mountain Mutual Ins. Co.*, 111 Vt. 502, 18 A. 2d. 264. And such violation would not be avoided by having solicitation made by another person. It is said that the sub-agent who wrote the policy has the records of the business in his office and upon the expiration of the policy has the right to solicit the business for any company that he may happen to represent at the time. The answer is that *the question here is not what the sub-agent may do, but what the company may do.* The sub-agent would have no power to approach the policyholder in behalf of the company unless the comany vests him with the power to do so; and the company should not thus cooperate with the sub-agent in doing what it has no right itself to do. When it does so, it violates the contract. It has no right in law, in equity, in good conscience or in common honesty, after making a contract of the sort made with the agent here, to take over their organization and through it appropriate to its own use the good will of his business as repre-

> sented by the 'expirations', which it has voluntarily agreed should belong to him." (Emphasis supplied.)

It is indeed true that in the next paragrah of the opinion the Court says plaintiff is entitled to recover only for the wrongful use by defendant or its agents of any of the "expirations" belonging to plaintiff. But, they say "expirations" and not expiration *records*. After having gone to such great lengths to clearly define the meaning and the purpose of the contract provision preserving to Phillips the undisputed possession of the record, use and control of the "expirations", and after having so painstakingly pointed out that this meant more than the records themselves, but meant the good will of his business as represented by the "expirations", surely it is incorrect to say that the Court bottomed its decision upon wrongful use of the records. The Court bottomed its decision upon exactly what it said it did, to-wit: the wrongful use of the "expirations", not "expiration records". The Court had already made it amply clear that "expirations" meant the good will of the business, and not just the record thereof.

Surely, anything less than this protection by the Courts presents a vacuity in the law. To say to Lee that all that was preserved to him by the contract was a batch of records and that while he clung to his physical possession of the records, Aetna could, by appointing his former employee, walk away with the business those records represented, so long as they did not make physical use of the records, brings to mind the immortal words of Mr. Bumble.[1]

The contract provision in our case (J.A. 460) reads:

> " . . . each company agrees that the agent's records of policyholders and expiration dates of policies or bonds shall remain in his exclusive possession and

[1] Oliver Twist, Chapter LI.

that said Company's record or knowledge of names of policyholders and expiration dates shall not be referred or communicated by said Company to any other agents nor used by said Company for purposes of solicitation."

As contrasted to the provision in the Phillips case (p. 247 of 199 F.2d.):

". . . the Agent's record, use and control of the expirations shall be deemed the property of the Agent and left in his undisputed possession."

Thus, in our case, the contract restrained Aetna from communicating to any other agents for purposes of solicitation its *knowledge* of names of policyholders, as well as its record thereof. If it could not divulge to any other agents its *knowledge* thereof, by what theory of the law, then, could it appoint as an office agent, Lee's former employee, who had dealt with these policyholders and thus had the knowledge, and allow him to use that knowledge for purposes of solicitation of Lee's customers to the prejudice of plaintiff.

The basic holding of the *Phillips* case was: (P. 248)

"The defendant had no right to solicit directly from the insured nor could it do so indirectly by appointing plaintiffs' former agents and thereby acquire through them the expirations and use them to the prejudice of plaintiffs."

Thus, in our case, Aetna had no right to solicit directly from Lee's insureds, nor could it do so indirectly by appointing Lee's former employee, Miller, and allowing him to solicit them. The decision of our Court reversing the judgment against Aetna is clearly in direct conflict with the Phillips decision in this regard.

Furthermore, the Court below discusses at some length, the transfer of the business of Epworth Methodist Church from Lee to Miller. They recite all of the facts in this

transaction, but do not advert to the one feature which makes this transaction relevant to liability, even under their rigid requirement that we prove use of the records. According to Aetna's own records, the renewal policy which should have been issued and sent to Lee, was actually issued by Aetna, on *August 6,* 1951, for the account of Miller, not Lee. Yet, the letter to Aetna from the Church, authorizing a change of its business from Lee to Miller, is dated *August 15,* 1951.

Thus, there is evidence in the record that Aetna was conspiring with Miller to take business away from Lee, by issuing Lee's renewal business to Miller at a time when they had absolutely nothing in their files from Lee's customer requesting or authorizing them to do it.

But, says our Court: "There was no evidence that Aetna made any of its records with respect to the Church's account available to Miller, an essential element in Lee's effort to prove conspiracy." Perhaps Aetna didn't show Miller their renewal or expiration records regarding this account, but, what need did Miller have of renewal records when Aetna actually placed the renewal policy, itself, in his hands?

One of the most outstanding elements of petitioner's case involved Aetna's handling of petitioner's customer, Altman, president of W. M. & A. Bus Lines. Our Court does not refer to it in its opinion, but this account involved annual premiums of about $35,000. Respondent Aetna arbitrarily transferred this business from Lee to Miller in the middle of the policy year, paying the balance of that year's commissions to Miller.

During the controversy between Lee, Miller, Altman and Aetna over this transfer, Boone, then manager of Aetna, went out to see Mr. Altman. There was no effort made by Boone to help Lee keep this business (J.A. 401) but, on the contrary, an active effort to work out a smooth

transfer of the business from Lee to Miller in the middle of the policy year. Which they did.

Aetna contends that Lee sought Boone's intervention in this matter and that Lee never objected to the transfer of this account in the middle of the policy year and that had he done so, they probably would have required that the policies be cancelled and rewritten. But, Lee testified that he protested strenuously all the way through these negotiations; that it was an almost unheard of situation where an agent was asked to forego his commissions in the middle of the policy year (J.A. 74). Altman, himself, testified that had Aetna required that he cancel out and rewrite to the account of Miller, it would have cost him considerable money and it was not likely that he would have done it (J.A. 405).

There was considerable conflict in the evidence regarding this matter but we maintain that the evidence here recited was sufficient to make it a jury question as to whether Aetna wrongfully interfered with and deprived petitioner of this valuable account and that the jury's verdict should have been left undisturbed on appeal.

CONCLUSION

Wherefore petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia and upon such review that the judgment of said Court be vacated and the judgment of the United States District Court for the District of Columbia entered upon the jury's verdict be reinstated.

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12451

THE AETNA CASUALTY AND SURETY CO., A CORPORATION, THE AUTOMOBILE INSURANCE CO., A CORPORATION, AND WOODROW W. MILLER, APPELLANTS,

v.

ADELBERT W. LEE, APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided January 19, 1956

Mr. Albert F. Beasley for appellants Aetna Casualty and Surety Company and The Automobile Insurance Company and *Mr. W. Cameron Burton* for appellant Woodrow W. Miller.

Mr. Albert Brick for appellee. *Miss Patricia Warren* also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: This is an appeal from a judgment for damages entered by the District Court in favor of the plaintiff-appellee, in accordance with a jury verdict. Plaintiff Lee has an established real estate and insurance business, representing a number of insurance companies, including the Aetna group (defendants here). Defendant Miller was employed by Lee to handle the in-

surance branch of his business. After some years he became dissatisfied and quit his job. On application to Aetna, he was made an "office agent" of Aetna, an arrangement whereby Miller was supplied by Aetna with office facilities next to (but not part of) the Aetna office, and accordingly received a slightly lower commission rate than is paid agents like Lee. It appears to have been understood that as an office agent the bulk of the business Miller developed would be given to Aetna. Over a period of more than a year after Miller became an office agent, approximately 60 persons who had previously insured with Aetna through Lee transferred their business to Miller, though continuing to insure with Aetna. A few of these transfers are not in issue, since they involve relatives of Miller and Lee does not make any claims with respect to them. However, as to the other transfers, Lee claims that they were the result of a conspiracy between Miller and Aetna, and it is essentially on the theory of conspiracy that Lee bases his action for damages.

Before discussing that theory and the evidence relating to it, we consider briefly other possible bases of liability. It appears to be suggested that Miller might be liable solely on the basis of soliciting his former employer's customers. But every insured who appeared as a witness testified that Miller did not solicit the transfer of business, and it was stipulated that all the other insureds would so testify. In any event, such solicitation alone would not give rise to liability, there being no agreement that Miller would not solicit or compete. 2 RESTATEMENT, AGENCY, § 393, Comment e; *ibid.* § 396. It is also contended that it was wrongful for Aetna to appoint Miller an office agent and then accept transfers of accounts from Lee to Miller. However, Lee's agency was not exclusive, and we can observe no basis for liability in Aetna's following the wishes of the customer (the insured) as to choice of agent. *Northwest Underwriters* v. *Hamilton*, 151 F.2d 389 (8th Cir. 1945); *Beidler & Bookmyer* v. *Uni-*

versal Ins. Co., 134 F.2d 828 (2d Cir. 1943). Appellee relies on *Kerr & Elliott* v. *Green Mountain Mut. Fire Ins. Co.*, 111 Vt. 502, 18 A.2d 164 (1941), to the contrary. However, this was a case in which there was evidence that the defendant insurer and its agent made use of the expiration data belonging to plaintiff, a former agent, and solicited plaintiff's customers. To the extent that statements in the case can be construed as establishing a rule applicable when these factors are not present, we are not persuaded by the decision.[1] Similarly *V. L. Phillips & Co.* v. *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co.*, 199 F.2d 244 (4th Cir. 1952), cert. denied, 345 U.S. 906 (1953), involved solicitation of plaintiff's customers and specifically conditioned its result on unauthorized use of plaintiff's expiration records. 199 F.2d at 249.

We turn now to plaintiff-appellee's principal theory of recovery, the conspiracy theory. The essence of the conspiracy charged is that Aetna made available to Miller renewal records relating to Lee's accounts, by which Miller was enabled to solicit Lee's customers as their policies came due for renewal. Aetna and Miller concede that an agent is entitled to recover "upon proof of solicitation by and with the use of the 'expirations' records, either directly by the company or by another agent to whom the company has wrongfully communicated the records." Appellants' Reply Br. p. 3. The proof offered may be briefly summarized. One instance was established in which Miller was given by Aetna some information concerning Lee's accounts: two persons asked Miller to check the accuracy of audits of their accounts with Lee, and in one of these cases an official of Aetna checked the audit for Miller. However, the insureds had already made their

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[1] See 16 Appleman, *Insurance Law and Practice* 538, n. 53: "To put it bluntly, this case goes too far."

copies of the audit information available to Miller, Aetna's audit records are separate from its renewal records, and in fact there was no transfer of the accounts in question.

Appellee also relies on an episode concerning a transfer of insurance business by the Epworth Methodist Church. The church's policy—written by Lee—did not expire until October 18, 1951. On August 6, 1951, Aetna prepared a renewal policy, substantially in advance of expiration of the old policy. In accordance with Aetna's custom, this would in due course be sent to Lee, the then agent, to tender to the insured for purposes of renewal. However, on August 15, the church in writing notified Aetna that Miller was its agent to handle renewal policies. On August 17 Aetna wrote Lee advising him of the church's letter and stating that the renewal business would be transferred as of August 31. A notation about the matter was made in Aetna's underwriting records.[2] The significance of this notation was argued here, though apparently not in the District Court. The point seems immaterial, because both the church's letter requesting the transfer and Aetna's letter to Lee notifying him of the transfer speak in terms of the renewal policy only. In any event, there is no evidence that any part of the commission on the old policy was transferred from Lee to Miller. As to the renewal policy, there was no evidence that Aetna made any of its records with respect to the church's account available to Miller, an essential

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[2] The notation follows:

"EPWORTH METHODIST CHURCH:

"Policy CX 14 (church burglary insurance) issued 10/22/48 for account of A. W. Lee, effective 10/18/48-51, premium $100.00, commission 20%. On this policy notation is made that agent is changed to W. W. Miller 8/31/51. Renewal policy CX 41 issued August 6, 1951 for account W. W. Miller, effective 10/19/51-54, premium $100.00, commission 20%."

element in Lee's effort to prove conspiracy. We find nothing in this episode, regarding it in the light most favorable to the plaintiff-appellee, which would lend any support to the charge of conspiracy.

Contrary to the allegation of conspiracy was the unanimous testimony of the numerous insureds that Miller did not solicit the transfers of business. This testimony tends to negate the theory that Aetna conspired to make renewal records available to Miller so that he could solicit Lee's customers. There is other evidence tending to negate the theory that Aetna and Miller were engaged in a conspiracy to deprive Lee of business. Miller and officials of Aetna testified that Aetna officials had tried to dissuade Miller from leaving Lee. Aetna officials testified that after Miller left Lee, Aetna gave Lee's office considerable assistance in developing new accounts, and the record includes letters from Lee to Aetna in which Lee thanked Aetna for such assistance. There was testimony that the quarters of the office agents were separated from the Aetna office, and that office agents had no more access to the underwriting department, where the renewal records were kept, than did an outsider. Our study of the record convinces us that there was no substantial evidence in support of the conspiracy theory. The appropriate motions for a directed verdict and for judgment n.o.v. having been made in the District Court, we are constrained to conclude that the judgment should be reversed and judgment entered for defendants.

So ordered.